# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 207

LARRY E. WEBB, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 359 F. 2d 558.

### JURISDICTION

The judgment of the court of appeals was entered on April 21, 1966. A petition for rehearing was denied on May 16, 1966 (Pet. App. B). The petition for a writ of certiorari was filed on June 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



223-453—66

## QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction of conspiracy.

2. Whether the court erred in instructing the jury that, under the evidence, it could not find one defendant guilty and all of the others not guilty on the conspiracy charge.

3. Whether the court adequately instructed the jury to disregard references to a third person, seen with petitioner, as a known liquor law violator.

## STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Eastern District of Kentucky of conspiracy to possess and transport illicit whiskey and was sentenced to three years' imprisonment (App. 3a–6a, 158a).[1] On appeal, the conviction was affirmed.[2]

Petitioner, a Tennessee used car dealer (App. 85a), conveyed a 1956 Chrysler to codefendant Plemmons on October 21, 1963 (App. 24a–26a, 28a–29a). On January 19, 1964, this Chrysler, equipped with coil or booster type springs for carrying heavy loads and bearing an Ohio license plate, was driven by one But-

[1] "App." refers to the Appendix to petitioner's brief in the court of appeals.

[2] The court of appeals reversed petitioner's conviction of the substantive offense of possessing and transporting whiskey in violation of 26 U.S.C. 5205(a)(2) (Pet. App. 25; App. 5a). It also reversed codefendant Stokely's conviction on the conspiracy count (Pet. App. 25). Codefendant Plemmons was convicted on both counts but did not appeal (Pet. App. 19).

ler from Cincinnati to the parking lot of the A–1 Liquor Store at Covington, Kentucky (App. 33a–34a, 45a–46a). There, Butler was observed standing next to a 1964 Pontiac occupied by petitioner and two others (App. 34a, 47a–48a). Butler drove away in another car, leaving the Chrysler in the parking lot. A few hours later, petitioner drove the Pontiac, and codefendant Plemmons drove the Chrysler, to a filling station in Lexington (App. 51a–52a). At the station, petitioner and Plemmons were observed working together on the rear of the Chrysler. Petitioner removed an overload coil spring from the Chrysler, and Plemmons took a Tennessee license plate from under the front seat of the Pontiac and attached it to the Chrysler in place of the Ohio plate (App. 53a–54a). Petitioner then asked the garage owner how much he owed him and paid the bill (App. 55a).

On February 21, 1964, petitioner conveyed a second Chrysler to Plemmons (App. 26a–27a). Two days later, codefendant Stokely, who had been with petitioner during the events of January 19 described above, was seen driving petitioner and two others in petitioner's Pontiac, followed by Plemmons, driving the second Chrysler (App. 36a, 38a, 55a–56a, 64a). The Chrysler bore the same Ohio license number as that borne by the first Chrysler on January 19. The Pontiac was driven to the A–1 Liquor Store's parking lot, and, shortly thereafter, Plemmons parked the Chrysler nearby (App. 37a–38a, 57a). Petitioner, Plemmons and codefendant Ball then went into a nearby tavern (App. 39a, 72a–73a).

Federal agents who had been observing the two cars saw two cases of moonshine whiskey on the rear floor of the Chrysler and arrested codefendants Stokely and Allen, who were sitting in the Pontiac (App. 39a–40a, 58a, 73a–74a).[3] Another agent arrested petitioner, Plemmons and Ball at the tavern and brought them back to the parking lot (App. 40a–41a, 58a–59a, 75a). Upon searching Ball, who had been a passenger in petitioner's Pontiac, the agents found a key to the trunk of the Chrysler. Inside the trunk, they found 150 gallons of whiskey without the required tax stamps (App. 41a, 60a, 78a, 138a). The agents also discovered a loaded revolver in petitioner's pocket (App. 59a, 75a–77a) and two Tennessee license plates under the driver's seat of his Pontiac (App. 63a, 79a). Two sets of overload coil springs were removed from the Chrysler; these were of the same type as those petitioner had removed from the first Chrysler on January 19 (App. 62a–63a).

## ARGUMENT

1. There is no occasion for this Court to review the sufficiency of the evidence. It is well settled that participation in a criminal conspiracy may be shown by circumstantial as well as direct evidence (*Delli Paoli* v. *United States,* 352 U.S. 232, 236; *Glasser* v. *United States,* 315 U.S. 60, 80; *United States* v. *Manton,* 107 F. 2d 834, 839 (C.A. 2)), and there was convincing evidence here from which the jury could reasonably infer petitioner's guilt.

[3] Allen was acquitted by the court, and codefendant Ball was found not guilty by the jury (App. 81a–82a, 159a–160a).

Petitioner sold Plemmons two Chryslers, each of which was equipped on January 19 and February 23 with overload coil springs for carrying heavy loads, such as large quantities of whiskey, and he was with Plemmons under similar circumstances on both of the dates in question. Although no whiskey was seen on January 19, the events of that date—particularly petitioner's removal of the Chrysler's overload springs and Plemmons' replacement of the Ohio license plate with a Tennessee plate taken from inside petitioner's Pontiac—strongly suggest a close collaboration between petitioner and Plemmons. As the court of appeals observed, "The striking parallels between the modus operandi employed by Plemmons on February 23 when he drove a load of whiskey to Covington which was seized and the modus operandi employed by him on January 19 are such as to allow the jury to infer that the events of January 19 represented the return leg of another * * * moonshine liquor trip" (Pet. App. 23).

On February 23, Plemmons followed petitioner to the parking lot which was the scene of a similar rendezvous on January 19. Ball, a passenger in petitioner's car, had a key to the trunk of the Chrysler in which the illegal whiskey was found, and petitioner had a loaded revolver, which was properly admitted as relevant to the issue of knowledge. In view of all the circumstances, it was proper for the jury to conclude that petitioner knew of the liquor in the Chrysler and engaged in a conspiracy to possess and transport it.

2. The trial court instructed the jury that it could not find one defendant guilty and all the others not guilty on the conspiracy count because there was no evidence that any defendant had conspired with anyone other than a codefendant (App. 143a, 152a–153a). Petitioner objected on the ground that, since there was evidence that an unidentified man was in the Chrysler with Plemmons on February 23, the jury was free to find that the only conspiracy was between one defendant and this unidentified person (App. 156a–157a). Out of the presence of the jury, the court commented as follows (App. 156a):

> I don't think so. I don't find anything, any proof against anyone other than these men named in this indictment. If there are others, which—I am not saying there were, there were probably others, too, but I don't think there is anything in this proof to justify the court saying, "You might find somebody else." There is no proof that there was anybody else, no telephone calls to any unknown persons, there is no identity of any unknown person except seeing somebody ride in the automobile just like Allen and we [directed a verdict of acquittal in his case.] * * *

There is no substance to petitioner's argument that the court's charge, which eliminated consideration of the unidentified passenger, in effect forced the jury to find petitioner guilty in order to convict Plemmons

on the conspiracy count. The jury, which convicted Miss Stokely and acquitted Ball (App. 158a), obviously considered the extent to which they regarded each defendant involved with Plemmons.[4]

3. Petitioner also seeks to overturn his conviction on the basis of references at trial to Butler, whom petitioner met at the liquor store parking lot on January 19, as a known liquor violator. When the prosecutor referred to Butler in this manner in his opening statement, the court sustained petitioner's objection and instructed the jury not to consider the statement (App. 15a–16a). During the examination of agent Laggenbauer, the court also sustained petitioner's objection and explicitly instructed the jury to disregard the witness's unsolicited statement that Butler was "a twice-convicted liquor law violator" (App. 48a). Petitioner's counsel did not ask for a mistrial on account of these remarks, and the court below properly declined to reverse his conviction on this basis. The jury is presumed to have followed the court's clear instructions and to have disregarded the remarks. *Opper* v. *United States,* 348 U.S. 84, 95; *Delli Paoli* v. *United States,* 352 U.S. 232, 242.

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[4] It is clear that *Martin* v. *United States*, 17 F. 2d 82 (C.A. 2), relied on by petitioner, has no application where, as here, all of the identified co-conspirators are tried together. *United States v. McCann*, 32 F. 2d 540, 542 (C.A. 2).

## CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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